

June 8, 2009

VIA FACSIMILE/U.S. MAIL
(866) 578-1333

Alison Berry Wilkinson
Berry | Wilkinson Law Group
4040 Civic Center Drive, Suite 200
San Rafael, CA 94903

Re: BART Internal Affairs Investigation

Dear Ms. Wilkinson:

I write in response to your letter to me dated May 28, 2009, regarding the interview notices your clients received regarding the pending BART internal affairs investigation. Notably, you assert that: (1) BART has provided inadequate notice to your clients regarding whether or not they are subjects of the investigation; (2) your clients have not received adequate advance notice of the allegations against each individual officer; and (3) your clients have not received copies of and/or transcripts of each prior statement given by them. In light of these alleged deficiencies, you have indicated that your clients will not proceed forward with the interviews.

In response to your first inquiry, all of the officers are subjects of the investigation and witnesses to any potential misconduct by any of the other BART officers and/or employees that had any involvement in the events that occurred surrounding the shooting death of Oscar Grant and/or on the Fruitvale BART Station in the early morning hours of January 1, 2009. As your clients are subjects of the investigation they are entitled to a representative of their choice, and they have chosen you to act in that capacity.

In response to the second issue identified in your letter, all officers were provided sufficient notice of the nature of the investigation consistent with Government Code Section 3303(c). In your prior correspondence to Chief Gee, you relied on the unpublished decision of *De Vincenzi v. City of Foster City* in support of your contention that the City failed to provide sufficient notice of the allegations against each officer. As you are aware, Section 3303(c) indicates that a "public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation." While the *De Vincenzi* case is unpublished and thus has no bearing on the instant situation, that case involved an interview notice prior to an interrogation that stated that an investigation "was being conducted into events that occurred on ____." The date of the alleged misconduct in the notice was omitted, however, so the Court held that the notice of the investigation was inadequate.

Contrary to the notice in *De Vicenzi*, in this case we have provided all officers with adequate notice of the nature of the investigation that is being conducted: "You are being investigated regarding your conduct at the Fruitvale BART Station in the early morning hours of January 1, 2009 during the events surrounding the shooting death of Oscar Grant. Your actions during the entire event are under review to determine if you were acting within District and departmental policy. This would include any use of force, interactions with civilians or other BART police officers, reporting of the incident, and any and all involvement you had while on the Fruitvale Station platform or with the detainees that morning." This description of the nature of the investigation -- unlike the notice in *De Vicenzi* -- provides you with more than enough information to assist your clients in preparing for the interview. In fact, as stated in your letter to me, your clients have provided statements regarding this matter on multiple occasions in the past. Accordingly, the investigation notices provided to your clients clearly comply with Section 3303(c). All of that said, however, I will ask the Chief to send another letter further detailing the areas for which your clients' actions are being investigated.

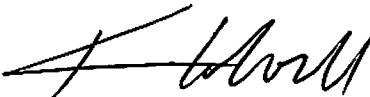
An officer is not entitled to preinterrogation discovery. (See *Pasadena Police Officers Assn. v. City of Pasadena*, 51 Cal.3d (1990).) Accordingly, your clients have no further entitlement to documents prior to their interviews, however, in the spirit of cooperation I will provide CDs of the recording of all of the officer interviews that I have. I will also provide copies of the still photographs used in the interview of Officer Domenici.

I am hopeful that you advise your clients to attend and fully participate in this investigation. If they fail to do so we will be forced to move forward without their input, and they will be subject to charges of insubordination for failing to participate as the Chief has ordered. Furthermore, they may waive their ability to present any evidence contrary to the investigation findings as they will have knowingly and willingly failed to cooperate with the investigation despite being ordered to do so by the Chief.

In anticipation of your cooperation, please send me several dates for the last two weeks of June when you and your clients will be available to interview. I would also be happy to discuss this further if you have any questions.

Very truly yours,

MEYERS, NAVE, RIBACK, SILVER & WILSON



Kimberly E. Colwell

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bc: Chief Gary Gee
Matthew H. Burrows, General Counsel
Jayne W. Williams, Esq.

June 8, 2009

VIA FACSIMILE/U.S. MAIL
(650) 572-1857

William R. Rapoport, Esq.
Law Offices of William R. Rapoport
643 Bair Island Road, Suite 400
Redwood City, CA 94063-2758

Re: BART Internal Affairs Investigation

Dear Mr. Rapoport:

I write in response to your recent letter to Chief Gee copied to me and the letter of Ms. Berry Wilkinson dated May 28, 2009, regarding the interview notices your client received regarding the pending BART internal affairs investigation. Notably, you assert that: (1) BART has provided inadequate notice to your client regarding whether or not he is the subject of the investigation; (2) your client has not received adequate advance notice of the allegations against him; and (3) your client has not received copies of and/or transcripts of each prior statement given by him. In light of these alleged deficiencies, you have indicated that your client will not proceed forward with the interviews.

In response to the first inquiry, all of the officers are subjects of the investigation and witnesses to any potential misconduct by any of the other BART officers and/or employees that had any involvement in the events that occurred surrounding the shooting death of Oscar Grant and/or on the Fruitvale BART Station in the early morning hours of January 1, 2009. As your client is the subject of the investigation he is entitled to a representative of his choice, and he has chosen you to act in that capacity.

In response to the second issue identified above, all officers were provided sufficient notice of the nature of the investigation consistent with Government Code Section 3303(c). In your prior correspondence to Chief Gee, you relied on the unpublished decision of *De Vincenzi v. City of Foster City* in support of your contention that the City failed to provide sufficient notice of the allegations against each officer. As you are aware, Section 3303(c) indicates that a "public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation." While the *De Vincenzi* case is unpublished and thus has no bearing on the instant situation, that case involved an interview notice prior to an interrogation that stated that an investigation "was being conducted into events that occurred on ____." The date of the alleged misconduct in the notice was omitted, however, so the Court held that the notice of the investigation was inadequate.

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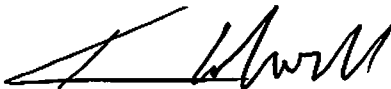
An officer is not entitled to preinterrogation discovery. (See *Pasadena Police Officers Assn. v. City of Pasadena*, 51 Cal.3d (1990).) Accordingly, your client has no further entitlement to documents prior to his interview, however, in the spirit of cooperation I will provide a CD of the recording of your client's interview. This is the only one that I have. I will also provide copies of the still photograph used in his prior interview.

I am hopeful that you will advise your client to attend and fully participate in this investigation. If he fails to do so we will be forced to move forward without his input, and he will be subject to charges of insubordination for failing to participate as the Chief has ordered. Furthermore, he may waive his ability to present any evidence contrary to the investigation findings as he will have knowingly and willingly failed to cooperate with the investigation despite being ordered to do so by the Chief.

In anticipation of your cooperation, please send me several dates for the last two weeks of June when you and your client will be available to interview. I would also be happy to discuss this further if you have any questions.

Very truly yours,

MEYERS, NAVE, RIBACK, SILVER & WILSON



Kimberly E. Colwell

William R. Rapoport, Esq.
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bc: Chief Gary Gee
Matthew H. Burrows, General Counsel
Jayne W. Williams, Esq.

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Alison Berry Wilkinson
Berry | Wilkinson Law Group
4040 Civic Center Drive, Suite 200
San Rafael, CA 94903

Re: BART Internal Affairs Investigation

Dear Ms. Wilkinson:

As referenced in my faxed letter to you of this date and in a continuing spirit of cooperation, enclosed please find audio files for the interviews of Emery Knudtson, Noel Flores, Jonathan Guerra, Jon Woffinden and Marysol Domenici and the 13 photos shown to Officer Domenici during her earlier interviews.

You now have copies of all written transcripts, audio transcripts and the photos used during the earlier interview. I look forward to completing your clients' interviews this month and moving on with a conclusion to our investigation.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

MEYERS, NAVE, RIBACK, SILVER & WILSON



Kimberly E. Colwell

KEC:edl
Enclosure
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Alison Berry Wilkinson

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bc: Chief Gary Gee (w/o enclosure)
Matthew H. Burrows, General Counsel (w/o enclosure)
Jayne W. Williams, Esq. (w/o enclosure)

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William R. Rapoport, Esq.
Law Offices of William R. Rapoport
643 Bair Island Road, Suite 400
Redwood City, CA 94063-2758

Re: BART Internal Affairs Investigation

Dear Mr. Rapoport:

As referenced in my faxed letter to you of this date and in a continuing spirit of cooperation, enclosed please find audio files for the interview of Anthony Pirone and the photo shown to Officer Pirone during his earlier interview.

You now have copies of all written transcripts, audio transcripts and the photos used during the earlier interview. I look forward to completing your client's interview this month and moving on with a conclusion to our investigation.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

MEYERS, NAVE, RIBACK, SILVER & WILSON



Kimberly E. Colwell

KEC:edl
Enclosure
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William R. Rapoport, Esq.
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bc: Chief Gary Gee (w/o enclosure)
Matthew H. Burrows, General Counsel (w/o enclosure)
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